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No. 85-492

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT T. DEVEREAUX, et al.
Petitioners-Appellants,

v.

WILLIAM J. GEARY, et al.
Respondents-Appellees.

and

PLAINTIFF-CLASS IN CULBREATH v. DUKAKIS
Intervenors, Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION OF THE INTERVENORS - APPELLEES TO THE PETITION FOR CERTIORARI

James H. Wexler
Lahive & Cockfield
60 State Street
Boston, MA 02109
(617) 227-7400
COUNSEL OF RECORD

Herman J. Smith, Jr.
Boston University
School of Law
765 Commonwealth Ave
Boston, MA 02111
(617) 353-3148

ATTORNEYS FOR THE INTERVENORS-APPELLEES,
PLAINTIFF-CLASS IN CULBREATH v. DUKAKIS

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QUESTIONS PRESENTED FOR REVIEW

I. CAN THE PETITIONERS CHALLENGE THE VALIDITY OF THE COLLATERAL ATTACK DOCTRINE WHEN THEIR COMPLAINT WAS TREATED AS A MOTION TO INTERVENE AND THEY WERE GIVEN THE OPPORTUNITY TO BE HEARD ON THE MERITS OF THEIR CLAIMS?

II. DOES THE FOURTEENTH AMENDMENT PERMIT AN EMPLOYER WHO HAS ADMITTED PAST PRACTICES OF DISCRIMINATION TO ENTER INTO A CONSENT DECREE WHICH PROVIDES FOR RACE-CONSCIOUS PROSPECTIVE RELIEF?

III. DOES TITLE VII PERMIT AN EMPLOYER WHO HAS ADMITTED PAST PRACTICES OF DISCRIMINATION TO VOLUNTARILY ENTER INTO A CONSENT DECREE WHICH PROVIDES FOR RACE-CONSCIOUS PROSPECTIVE RELIEF?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	11
I. THE DUE PROCESS RIGHTS OF THE PETITIONERS' WERE NOT VIOLATED WHEN THE DISTRICT COURT AND THE COURT OF APPEALS TREATED THEIR COMPLAINT AS A MOTION TO INTERVENE IN THE UNDERLYING ACTION.....	11
II. THE CONSENT DECREE IS VALID SINCE THE FOURTEENTH AMENDMENT ALLOWS FOR RACE CONSCIOUS RELIEF ABSENT A SHOWING OF IDENTIFIABLE VICTIMS.....	14
III. FIREFIGHTERS LOCAL UNION NO. 1784 v. STOTTS DOES NOT AFFECT THE VALIDITY OF THE CULBREATH CONSENT DECREE.....	20
CONCLUSION.....	29

TABLE OF AUTHORITIES

CASES	PAGE
Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982).....	19
Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), cert. denied, 104 S. CT. 703 (1984).....	19
Bushey v. New York State Civil Service Commission, 733 F.2d 220 (2nd Cir. 1984), cert. denied, _____ U.S. _____ (1985).....	19, 28
Culbreath v. Dukakis, Civil Action No. 74-2463-MA (D. Mass.).....	passim
Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980).....	8, 24
Diaz v. American Telephone Telegraph, 752 F.2d 1356 (9th Cir. 1985).....	28
Dennison v. City of Los Angeles Department of Water and Power, 658 F.2d 694 (1981).....	8, 12
Firefighters Local Union No. 1784 v. Stotts, _____ U.S. _____ 104 S.Ct. 2576 (1984).....	passim
Fullilove v. Klutznick, 448 U.S. 448 (1980).....	16, 17
.....	18, 19

CASES PAGE

Grann v. City of Madison, 738 F.2d 786 (7th Cir. 1984), cert. denied ____ U.S. ____, 105 S.Ct. 296 (1984)..... 13

Januwiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir, 1984)..... 19

Kromnick v. School District of Philadelphia, 739 F.2d 894 (3rd Cir. 1984)..... 28

O'Burn v. Shapp, 70 F.R.D. 549 (E.D.Pa. 1976), aff'd without published opinion, 546 F.2d 418 (3rd Cir. 1976), cert. denied, 430 U.S. 968 (1977)..... 12

Smith v. Missouri Pacific Railroad Company, 615 F.2d 683 (5th Cir. 1980)..... 13

Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied sub. nom. Ashley v. City of Jackson, ____ U.S. ____, 104 S.Ct. 255 (1983)..... 8
..... 11, 13

Turner v. Orr 759 F.2d 817 (11th Cir. 1985)..... 29

CASES PAGE

United Steelworkers of America v. Weber, 443 U.S. 193 (1979)..... 4
.....7, 25-28

University of California v. Bakke, 438 U.S. 265 (1978).....4, 13
..... 18, 19

Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1981)..... 19

Van Aken v. Young, 750 F.2d 43 (6th Cir. 1984)..... 27

Vanguards of Cleveland v. Cleveland, 753 F.2d 479 (6th Cir. 1985) cert. granted _____ U.S. _____(1985)..... 28

STATUTES	PAGE
United States Constitution, Amendment V	16
United States Constitution, Amendment XIV.....	passim
Title VI of the Civil Rights Act	14, 15
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e et. seq.....	passim
Public Works Employment Act of 1977.....	17, 18
Voting Rights Act of 1965.....	15
42 U.S.C. §1981.....	1, 4
42 U.S.C. §1983.....	1

STATEMENT OF THE CASE

On July 1, 1971, the plaintiffs, intervenors ("the Class"), asserting claims pursuant to the fourteenth amendment of the United States Constitution, 42 U.S.C. §1981 and 42 U.S.C. §1983, filed a class action Jackson et al. v. Sargent, et al. [now Culbreath v. Dukakis] on behalf of minority residents of the City of Boston alleging that the then Governor, the Civil Service Commission and various state agencies had engaged in racial discrimination in their employment and promotional practices.

On December 18, 1978, after two years of negotiations, the Class and the defendants submitted a proposed Consent Decree and a Stipulation of Facts to the Court. In that stipulation the parties stated:

> "The parties believe that the stipulation of facts

> set forth below and acknowledged by the Court constitute findings of such past practices of discrimination of both a judicial and administrative nature, sufficient to sustain under Title VII of the Civil Rights Act of 1964, thereby providing sufficient grounds for the remedies set forth in the Decree.

The Stipulation which was signed by the Governor, the Attorney-General and the heads of each of the defendant agencies, further stated that the statistics demonstrated a racially disproportionate underemployment of minorities in most job classifications and that the defendants have in the past and continue to have engaged in numerous non job related employment practices which have caused the racially disproportionate underemployment of minorities. The Consent Decree which lasts for eight

years, requires the defendants to cease the use of discriminatory employment practices, undertake increased recruitment of minorities and to employ an increasing number of minorities over the term of the decree.

On August 27, 1979, the trial court denied motions to intervene brought by a number of unions representing employees holding positions covered by the Consent Decree on the basis that they were untimely. On August 30, 1979, the trial court signed and entered the Stipulation of Facts, signed and entered the Consent Decree, and retained jurisdiction of the matter. The parties who sought to intervene filed timely notices of appeal.

The denials of intervention were upheld by the United States Court of Appeal for the First Circuit,

Culbreath v. Dukakis, 630 F.2d. 15 (1st Cir. 1980). In reviewing the Consent Decree, the First Circuit determined that the Consent Decree was fair, adequate, reasonable and lawful, and that racial preference schemes were accepted means of remedying past discrimination relying on United Steelworkers of America v. Weber, 443 U.S. 193 (1979); University of California v. Bakke, 438 U.S. 265 (1978).

On July 12, 1984, the petitioners, five white males, employed by the Metropolitan District Commission ("MDC"), filed the present action pursuant to the fourteenth amendment and 42 U.S.C. §1981 seeking to undo the appointment under the terms of the Consent Decree, of a black male, Donald Callender, to a provisional position as a Captain with the MDC. In their Complaint the petitioners simply alleged

that they had "been denied the opportunity to be considered for the position," and that because of their race, one of them had been denied the position. The petitioners did not allege that Callender was not qualified or eligible to fill the position. Further, the petitioners did not allege that the appointment of Callender violated the existing seniority system or that it contravened any existing collective bargaining agreement between the petitioners and the defendants.

Both the First Circuit and district Court treated the petitioners' complaint as a motion to intervene in Culbreath v. Dukakis. In addressing the issues of the timeliness of this attempt to intervene, the First Circuit found that but for the decision of the United States Supreme Court in Firefighters Local Union No. 1784 v. Stotts ___

U.S. ___, 104 S. Ct. 2576 (1984), the facts before the district court were virtually identical to those before the First Circuit in 1980. The First Circuit and the district court rejected the petitioners' argument that there was an unusual circumstance created by a change of Title VII law based on Stotts. Both the First Circuit and the district court found that Stotts was inapplicable in that Stotts dealt with a court's power to modify a consent decree over the objection of one of the parties and with a court's power to enjoin the operation of a bona fide seniority system during a time of layoffs. Neither of these issues were before the district court. A further distinction that the First Circuit made was that the parties had stipulated that discriminating patterns and practices existed that were sufficient to support

a Title VII action and that the petitioners challenged provisions to which the original parties had agreed. The First Circuit and district court rejected the petitioners' contention that the Court meant to rewrite Title VII law to make affirmative action programs improper absent a finding of actual past discrimination. The First Cicuit concluded that absent an express announcement to the contrary, Weber remains good law.

SUMMARY OF ARGUMENT

The present action is a direct attack upon the goals of the Consent Decree and the mechanisms agreed upon to achieve those goals. Because the present action directly attacks and attempts to undo the remedial aspects in Culbreath, the action is an impermissible collateral attack on the

Consent Decree and the district court correctly dismissed the Complaint. Thaggard v. City of Jackson, 687 F.2d 66, 68 (5th Cir. 1982), cert. denied sub. nom. Ashley v. City of Jackson, _____ U.S. ____, 104 S.Ct. 255 (1983); Dennison v. City of Los Angeles Department of Water and Power, 658 F.2d 694 (1981).

As the Complaint is an impermissible collateral attack, the district court and First Circuit correctly chose to treat it not as a separate complaint but as an attempt to intervene in that action. Treated as a motion to intervene, intervention was untimely since the factual issues raised by such an effort to intervene have already been determined. Dukakis v. Culbreath, 630 F.2d 15 (1st Cir. 1980). Since the district Court and the First Circuit heard petitioners' claims in the

context of a motion to intervene, the petitioners did not suffer any due process violation, were not harmed and have no basis to raise the validity of the collateral attack doctrine.

The petitioners' contention that the decision of the United States Supreme Court in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. _____, 104 S.Ct. 2576 (1984) makes invalid the Consent Decree is incorrect. At issue in Stotts was the legality of an order which modified an existing consent decree where there had been no admission or finding of racial discrimination and which resulted in the termination of the employment of non-minorities in a manner which violated an existing seniority system. In setting aside the modification to the consent decree, the Court did not set aside the underlying Consent Decree

which provided for race-conscious selection and provided prospective relief for unproven victims of discrimination. Nor did the Stotts decision directly or implicity overrule a long line of cases under the fourteenth amendment and Title VII in which it and numerous Circuit Courts of Appeal have upheld remedial race-conscious plans implemented either through agreement or consent decree.

The present case is dramatically different than Stotts. Not only have there been conclusive admission of facts of discrimination, the terms of the Consent Decree mandate that an alternate list be used only when the defendants have failed to meet hiring goals contained in the Consent Decree. The use of the alternate list did not require the termination of the employment of a non-minority, did not

interfere with an existing seniority system, and simply resulted in the employment of a qualified minority in an voluntary effort (albeit entered under the threat of litigation) by the defendants to undo the effects of years of racial discrimination.

ARGUMENT

I. THE DUE PROCESS RIGHTS OF THE PETITIONERS WERE NOT VIOLATED WHEN THE DISTRICT COURT AND THE COURT OF APPEALS TREATED THEIR COMPLAINT AS A MOTION TO INTERVENE IN THE UNDERLYING ACTION.

There is good reason for the collateral attack doctrine and that is to protect the parties to a consent decree from inconsistent or contradictory proceedings. See e.g., Thaggard v. City of Jackson 687 F.2d 66 (5th Cir. 1982), cert. denied sub. nom. Ashley v. City of Jackson, ____ U.S. _____, 104 S.Ct. 255 (1983);

Dennison v. City of Los Angeles Department of Water and Power, 658 F.2d 694 (9th Cir. 1981); O'Burn v. Shapp, 70 F.R.D. 549 (E.D.Pa. 1976), aff'd. without published opinion, 546 F.2d 418 (3rd Cir. 1976), cert. denied, 430 U.S. 968 (1977). In seeking a review of the collateral attack doctrine the petitioners contend that the doctrine violates their due process rights. In making such an argument, the petitioners ignore the fact, that by treating their complaint as a motion to intervene the district court specifically allowed them to be heard on the merits of their claims that their constitutional rights had been violated by the operation of the Consent Decree.

If the petitioners' position were adopted, then each time a minority was advanced, a different non-minority would have the opportunity to initiate

an attack on the Consent Decree by a separate lawsuit. To permit repeated attacks "would severely undercut important notions of judicial efficiency," Thaggard v. City of Jackson, 687 F.2d at 69, and would undermine the finality and integrity of the settlement process. Grann v. City of Madison, 738 F.2d 786, 794 (7th Cir. 1984) cert. denied, ___ U.S. ___, 105 S.Ct. 296 (1984); Smith v. Missouri Pacific Railroad Company, 615 F.2d 683 (5th Cir. 1980). Even if the petitioners had been permitted to file a separate action the only issue they could have raised was the effect of the Stotts case. Therefore, as long as a party has the right to attempt to intervene, there is simply no harm to the constitutional right of these parties or any other party to be heard.

II. The Consent Decree is Valid Since the Fourteenth Amendment Allows for Race Conscious Relief Absent a Showing of Identifiable Victims.

The petitioners' position ignores the rulings in University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, the Supreme Court invalidated the University of California's race-conscious preferential admissions program as violating Title VI of the Civil Rights Act of 1964, which the Court considered to be coextensive with the fourteenth amendment. 438 U.S. at 287. However, the Court in Bakke clearly establishes the principal that under the fourteenth amendment the state has a legitimate and substantial interest in ameliorating or eliminating the effects of identified discrimination. 438 U.S. at 307. These preferences may be imposed where a legislative or administrative body has

made findings of constitutional or statutory violations. 438 U.S. at 301. Even absent a determination of discrimination a public agency may, without violating the fourteenth amendment, take into consideration racial classifications which are designed to further remedial purposes as long as they serve important governmental objectives and are related to those objectives. 438 U.S. at 316-319. In his plurality opinion, Justice Powell noted that "this case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under §5 of the Voting Rights Act of 1965...." Id. at 302 n.41. Moreover he agreed with Justices Brennan, White, Marshall and Blackman that neither Title VI nor the

fourteenth amendment raised an absolute bar to the use of race in university admissions. Id. at 325-326 (Brennan J., concurring in part and dissenting in part). Finally, Justice Brennan argued, based on his analysis of several school desegregation cases, that prospective race-conscious "relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against, it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. Id. at 363.

In Fullilove v. Klutznick, 448 U.S. 448 (1980), this court reaffirmed that governmental remedial programs which are race-conscious do not necessarily violate the equal protection component of the Due Process Clause of the Fifth Amendment. At issue was a

"minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977 which required that at least ten percent of federal funds granted for local public works projects be used by the state or local grantee to procure goods and services from businesses owned by minority group members. The Court held that where Congress had the authority to act to remedy the effects of past discrimination, equal protection does not require it to "act in a wholly color-blind fashion." Id. at 482. Additionally, the Court stated that the fact that some non-minority business enterprises may be innocent of any past discriminatory conduct was not controlling because the purpose of the MBE program is to remedy the present effects of the virtual exclusion of minority firms from contracting opportunities because of which

non-minority firms may have in the past reaped competitive benefit. Id. at 485. Finally, the MBE program was constitutional even though it might disappoint the expectations of non-minority firms because "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." Id. at 484. Significantly, the Fullilove court did not require that Congress first find that the individual recipients of the MBE program had individually been discriminated against as a predicate for race-conscious relief. Remedying the effects of past discrimination is sufficient reason for the race-conscious program. Id. at 496 (Powell, J., concurring). Thus Bakke and Fullilove make clear that governmental

race-conscious remedial action, even in the absence of a showing of actual individual victims, is permissible under the fourteenth amendment. The petitioners point to no case which has expressly either overruled or limited the scope of Bakke and Fullilove. The Circuit Courts have also affirmed the constitutionality of race-conscious remedies on a number of occasions. See Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982); Janowiak v. Corporate City of South Bend, 750 F.2d 557, 563-4 (7th Cir. 1984); Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983); cert. denied, _____ U.S. ____, 104 S. Ct. 703 (1984); Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, 454 U.S 1124 (1981); Bushey v. New York State Civil Service

Commission, 733 F.2d. 220 (2nd Cir., 1984) cert. denied, _____ U.S. _____, 105 S. Ct. 803 (1985).

III. Firefighters Local Union No. 1784 v. Stotts Does Not Affect the Validity of the Culbreath Consent Decree.

As the circuit court stated, what is at the heart of this case is the petitioners' claim that the United States Supreme Court's decision in Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____, 104 S.Ct. 2576 (1984) is applicable to the present case. There is, however, nothing in Stotts which is relevant or applicable to the case at bar.

In Stotts, the United States District Court for the District of Tennessee had previously approved a consent decree which provided for remedial race-conscious hiring relief and did not modify or overturn the

existing seniority system. At the request of the plaintiffs the court entered a preliminary injunction modifying the consent decree and enjoining the Memphis Fire Department from following its seniority system in determining who would be laid off as a result of a budgetary shortfall. When layoffs were carried out pursuant to this order, it resulted in white employees with more seniority than black employees being laid off. The seniority system in its original state would have resulted in the layoff of black employees with less seniority. On appeal, the Sixth Circuit affirmed, holding that the district court's preliminary injunction was proper and that it had acted correctly in modifying the consent decree.

The central issue before this Court was whether the preliminary injunction was justified either as an

effort to enforce the consent decree or as a valid modification of the consent decree. The Court reversed and held that the district court's preliminary injunction was not justified either as an effort to enforce the consent decree or as a valid modification of the consent decree. Central to the Court's holdings were the following arguments: (a) because the consent decree contained no provision regarding layoffs or any provision suggesting any interest to depart from the existing seniority system, the injunction could not be justified as an attempt to enforce the decree; and (b) the attempted modification was not valid because it was an unlawful attempt to abrogate the terms of a bona fide seniority system protected by Section 703(h) of Title VII without a prior finding of discriminatory intent and to the

detriment of non-minority workers. It is important to emphasize that Stotts dealt only with terminations in light of a bona fide seniority plan and not with prospective race-conscious affirmative relief.

The distinctions in this case are critical. First, the action which is challenged is mandated by the Consent Decree, was contemplated by the parties and is neither a result of a modification of the Decree nor the result of an injunction seeking to enforce a provision of the Decree. Second, there has been a clear admission by the defendants to the Consent Decree of the intentional use of discriminatory employment practices resulting in significant underrepresentation of minorities in the defendant state agencies. Third, the promotion of Callender does not impinge or violate

the rights of the petitioners or for that matter of any individual under the existing seniority system. Fourth, neither the petitioners nor any other individual are losing a position which they presumably have nor are they facing a reduction in salary. Fifth, the actions complained of were mandated, in part, by the collective bargaining agreements in place at the time that the Decree was implemented. Culbreath v. Dukakis, 630 F.2d at 24. Sixth, the Consent Decree does not bar the promotions of non-minorities. Seventh, the terms of the Consent Decree are limited in duration and no one has questioned the reasonableness of those terms. Lastly, none of the parties to the Consent Decree have objected to the operation of any of its terms.

The petitioners insist that Stotts creates a significant and

dramatic change in the Title VII law, namely that Section 706(g) of Title VII proscribes all race-conscious remedies except for those which are limited to actual victims of past discrimination. However, the Stotts Court neither addressed nor ruled upon such a broad issue. Rather, as noted above, the Stotts Court faced the more limited issue of the lawfulness of the abrogation of a bona fide seniority system by a court imposed race-conscious remedy. In deciding this issue the Stotts Court did not condemn race-conscious remedies imposed in any context other than Section 706(g) of Title VII and did not forbid voluntary race-conscious plans such as the one it approved of in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). In short, Stotts stands for the narrow proposition that a Court may not,

against the wishes of any party, modify a consent decree by adding a provision never agreed to by the parties which abrogated the layoff provisions of a bona fide seniority system at the expense of non-minorities. It is significant that the Stotts Court did not even hint that the 50% hiring goal and the 20% promotion goal, contained in the Stotts consent decree, were in any way impermissible under Title VII.

The petitioners have ignored the import of those lines of cases which permit an employer, both public and private, to take into consideration race-conscious decisions under Title VII.

In United Steelworkers of America v. Weber, the Supreme Court sustained a voluntarily adopted affirmative action plan. The court stated that the question was not what

Title VII requires or what a court might order to remedy a Title VII violation, but rather what voluntary actions might be lawfully be taken under Title VII. Weber at 200. In its decision, the Court held that voluntary efforts to undo racial imbalances was permissible under Title VII, notwithstanding the absence of any finding of intentional discrimination or identification of actual victims. It was sufficient that there be "conspicuous racial imbalance in traditionally segregated job categories" Weber at 209. The court articulated the standard to be used in determining the reasonableness of a racial preference plan to be whether the plan is of limited duration, whether it unnecessarily tramelled the interests of non-minorities and whether it is substantially related to the purpose of remedying the effects of

discrimination. Id. at 208. Since Weber, all of the Circuit Courts have upheld voluntarily adopted affirmative action plans of private parties and of state and local governments and agencies in cases similar to Weber as well as in cases involving consent decrees. See e.g., Van Aken v. Young, 750 F.2d 43 (6th Cir., 1984); Diaz v. American Telephone & Telegraph, 752 F.2d 1356 (9th Cir., 1985); Kromnick v. School District of Philadelphia, 739 F.2d 894 (3d Cir., 1984), cert. denied, 105 S. Ct. 782 (1985); Bushey v. New York Civil Service Commission, 733 F.2d 220 (2d Cir., 1984), cert. denied, _____ U.S. _____, 105 S. Ct. 803 (1985). Similarly, in the cases which have been decided subsequent to Stotts a number of courts have agreed with the district court and circuit court and rejected the argument that Stotts barred prospective

race-conscious relief in Title VII cases. See e.g., Turner v. Orr, 759 F.2d 817, 823-826 (11th Cir. 1985); Vanguards of Cleveland v. City of Cleveland, 753 F. 2d 479 (6th, 1985) cert. granted _____ U.S. _____ (1985).

CONCLUSION

For all of the above reasons, the petitioners' petition for certiorari does not present matters which warrant review by this Court and the petition should be denied.

PLAINTIFF-CLASS IN CULBREATH
v. DUKAKIS

By their attorneys,

James H. Wexler
Lahive & Cockfield
60 State Street
Boston, Massachusetts 02109
(617) 227-7400

[COUNSEL OF RECORD]

Herman J. Smith, Jr.
Boston University School
of Law
765 Commonwealth Avenue
Boston, Massachusetts 02111
(617) 353-3148

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